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NTSB Order No. EA-3823

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1993

_____)	
Petition of)	
)	
BENTON W. BULLWINKEL)	
)	
for review of the denial by)	Docket SM-3938
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of an airman)	
medical certificate.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the initial decision and order issued by Administrative Law Judge Jimmy N. Coffman, issued at the conclusion of an evidentiary hearing on March 18, 1992.¹ By that decision, the law judge reversed the Administrator's denial of petitioner's application for an unrestricted third-class airman medical certificate. The Administrator concluded that petitioner was not qualified under paragraphs (d)(1)(ii), (d)(2)(ii), and (f)(2) of sections 67.13, .15, and .17 of the

¹A copy of the oral initial decision is attached.

Federal Aviation Regulations (FAR)(14 C.F.R. part 67)² given petitioner's "history of mood swings, attention deficit disorder and the use of disqualifying medication (lithium and Ritalin)." In response to a petition for reconsideration the Administrator again denied the request, stating that "the use of the medication Ritalin and Lithium is disqualifying for all classes of medical certification." A special issue medical certificate, as authorized by FAR section 67.19, also was denied.

The law judge determined that the record does not support denial of a medical certificate. He found that Mr. Bullwinkel's condition and the medication taken to regulate it do not pose an unacceptable risk to aviation safety. For reasons set forth below, we will grant the Administrator's appeal.

The evidence revealed that petitioner first obtained an airman medical certificate in 1987. On that application, which was admitted into evidence, when requested to list medical treatment received within the past five years, petitioner included "counseling." As a result, the Administrator asked to review all the medical records pertinent to this counseling before making a decision.

Dr. Robert E. Damptz, a board-certified psychiatrist, responded to the request by letter dated April 7, 1987. He wrote that approximately two years before, he had terminated the

²Sections 67.13 and 67.15 apply to first-class and second-class medical certificates, respectively. Section 67.17 applies to third-class medical certificates and is the pertinent regulation in the instant case. See Appendix.

Ritalin therapy for Mr. Bullwinkel and began prescribing lithium carbonate. At the time the letter was written, Mr. Bullwinkel had been off all medication for five months. Dr. Damptz continued, "I see no future need for medication at the present time." Exhibit P-1, p. 9. The Administrator consequently found petitioner eligible for a medical certificate. In 1989, Mr. Bullwinkel's renewal application was granted, as there were no changes from the previous filing.

In his most recent application for renewal dated February 2, 1991, petitioner stated that he consulted a Dr. Hanni on January 31, 1991, for "concentration problems." The aviation medical examiner did not issue a certificate, pending further evaluation.³ On May 9, 1991, the Administrator denied the application due to petitioner's "history of mood swings, attention deficit disorder and the use of disqualifying medication (lithium and Ritalin)." Petitioner then requested reconsideration. Dr. John W. Hanni, a board-certified psychiatrist, wrote on June 10, 1991, on petitioner's behalf, that Mr. Bullwinkel "is currently receiving" 1200 mgs. of lithium carbonate and 10 mgs. of Ritalin per day. He explained that his patient had been medication-free for about four to five years until November 1990, when, after evaluation, the above-mentioned

³The doctor's comments on the application were: "On Lithium for mild mood swings and on Ritalin for attention deficit syndrome. Treating physician will forward reports to you...." Exhibit P-1, p. 2.

medication therapy began.⁴ Dr. Hanni concluded by advising that petitioner was medically able to exercise the privileges of an airman certificate. The Administrator, however, found the use of the medication disqualifying and, on September 5, 1991, denied the request for reconsideration.

In his appeal, the Administrator argues that the law judge's decision is contrary to Board precedent and inconsistent with the evidence. He further asserts that the law judge incorrectly found that the cited cases were not factually similar enough to the instant case to be considered binding precedent. Petitioner, in turn, maintains that the law judge's decision was correct, as the cases cited by the Administrator were inapposite.

Under section 602(b) of the Federal Aviation Act, as amended, 16 U.S.C. § 1422, the Board is empowered to review petitions for airman certificates denied by the Administrator. The burden of proof in medical certification cases is on the petitioner to show, by a preponderance of the substantial, reliable, and probative evidence, that he is qualified for the certificate. Section 821.25 of the Board's Rules of Practice. See also Petition of Dennis, 2 NTSB 2145, 2146 (1976). The proof

⁴Dr. Hanni wrote: "[T]he patient reported that in March of 1990 he experienced a period of elevated mood with irritability, racing thoughts, pressured speech and mild distractibility. This was followed approximately 6 weeks later in May of 1990 by the occurrence of a depressed mood ... and impaired concentration." Exhibit P-1, p. 15. Consistent with a diagnosis of mild bipolar disorder, he placed the patient on lithium with positive results.

The patient also reported "difficulty sustaining his attention with secondary restlessness and distractibility...." Id. He was diagnosed with mild "attention deficit-hyperactivity disorder" for which Dr. Hanni prescribed Ritalin.

must come from expert medical testimony, which the Board will evaluate based on the "logic, objectivity, persuasiveness, and depth of the medical opinion." Administrator v. Loomis, 2 NTSB 1293, 1294 (1975), aff'd sub nom. Loomis v. McLucas, 553 F.2d 634 (10th Cir. 1977).

Petitioner does not dispute that he suffers from bipolar disorder (more commonly known as manic-depressive illness), which he controls through the administration of lithium. He also admits that he took Ritalin to regulate an attention deficiency problem, but testified that he no longer uses that medication.

According to the testimony of petitioner's medical expert, Dr. Hanni, bipolar illness can often be controlled effectively with a sufficient concentration of lithium and when so managed, should not impair a pilot's ability to operate an aircraft.⁵ Too much of the drug, however, will create lithium toxicity in the patient with disabling and potentially fatal results.⁶ Tr. at 113-14. Thus, the patient must be monitored to assure proper

⁵Dr. Hanni testified that left untreated, mild mixed bipolar disorder might significantly impair a person's ability to operate an aircraft. In depression, there might be impairment of energy and concentration. During hypomanic episodes, there might be impaired focus of attention and an increase in risk-taking. Transcript (Tr.) at 122.

⁶According to the 1991 Physicians' Desk Reference (PDR), Exhibit R-1, "[l]ithium toxicity is closely related to serum lithium levels, and can occur at doses close to therapeutic levels." Dr. Hanni, although stating that he does not rely on the PDR, responded that he did not disagree with the PDR's warning that "[l]ithium may impair mental and/or physical abilities. Caution patients about activities requiring alertness (e.g., operating vehicles or machinery)." Tr. at 164. He disagreed with the PDR's recommendation to monitor serum lithium levels in uncomplicated cases every two months.

dosage.⁷ Even without toxicity, Dr. Hanni acknowledged, lithium can have side effects, such as mild hand tremors, diabetes insipidus which causes frequent urination, hypothyroidism, and impaired kidney function. Dr. Hanni recommends monitoring a patient who has responded well to lithium at six-month intervals.⁸

Dr. Hanni defined a "breakthrough" as a common occurrence that happens when a patient who is taking lithium to prevent an episode of bipolar disorder nevertheless has an episode.⁹ Tr. at 126. He believes, however, that variations in lithium levels are quite controllable and that, as such, petitioner would be able to exercise the duties and privileges required for a third-class airman certificate.¹⁰

⁷Dr. Hanni testified that "the problem in using lithium is that we have to get the patient's serum level in the right range, and we do this by regulating dosage and monitoring that with serum lithium levels and that's essential to the proper use of lithium." Tr. at 114.

⁸Dr. Hanni admitted that Mr. Bullwinkel's serum lithium levels had been tested only twice in a year and a half: once when the treatment began, and again approximately two months before the hearing. Although the doctor ordered the test, "Benton didn't get around to it on time." Tr. at 161.

⁹He stated that although it is common, between 60 and 70 percent of patients on lithium are relatively symptom-free for long periods of time. Tr. at 126-27.

¹⁰Dr. Hanni opined that he did not expect Mr. Bullwinkel to have a breakthrough. He explained that the two most common causes of breakthroughs are poor patient compliance and lack of skill in the treating physician. He was not asked, and hence did not explain, how he could assume that Mr. Bullwinkel would be compliant with his directives in the future when he could not "get around" to having his serum lithium levels tested every six months as recommended.

The Administrator's expert witness, FAA Chief Psychiatrist Dr. Barton Pakull, expressed concern over symptoms of lithium toxicity, such as confusion, lethargy, blurred vision, ataxia, and problems with balance. These symptoms, even if extremely mild, could pose a serious problem for a pilot under the stressful demands of flight. Tr. at 205-06. For these reasons, Dr. Pakull testified, no one who was taking lithium would be issued an unrestricted airman certificate. It is possible for such a person to obtain a medical certificate, he explained, but only with the requirements that the airman's serum lithium level be tested periodically (about every three to six months) and that reports from the treating psychiatrist be routinely forwarded to the FAA. Tr. at 212.

We find that the Administrator's policy regarding lithium usage, as testified to by Dr. Pakull, is prudent and is not, as petitioner suggests, unjustifiably discriminatory against lithium users. There are certain risks associated with the ingestion of lithium that are incompatible with the acquisition of an unrestricted medical certificate. Periodic monitoring is necessary to insure that the certificate holder's malady is being adequately regulated. We addressed this issue in Petition of Walker, NTSB Order No. EA-3504 (1992), and although the facts are not identical to those of the instant case, the legal principles are pertinent. In Walker, the petitioner was being treated with codeine, Imodium, and Levsin for chronic pancreatitis. Her

petition for an unrestricted medical certificate was denied.¹¹

We advised that a person engaged in the unmonitored use of medication to control the symptoms of an illness is not generally an appropriate candidate for an unrestricted medical certificate.¹² See also Petition of Doe, 5 NTSB 41 (1985).

Lithium use traditionally has disqualified airmen from obtaining unrestricted medical certificates for concerns similar to those expressed by Dr. Pakull. See e.g., Petition of Bruckner, NTSB Order No. EA-3362 (1991); Petition of Rose, NTSB Order No. EA-3260 (1991). We disagree with the law judge's view that the facts of these cases are too dissimilar to the instant case to be persuasive. The facts may be different, but the apprehension over the possible effects of lithium ingestion on an airman is the same.¹³

¹¹We applied principles from William H. Vandenberg, Petitioner, 3 NTSB 2880, 2882, n. 4. (1980):

"[W]here maintenance of a Petitioner's health is vitally dependent on continuing medical attention and treatment, that individual is not entitled to a medical certificate that neither reflects such dependence nor provides the Administrator with some mechanism for ensuring compliance with the medical requirements on which his sustained health depends."

Walker at 6.

¹²A cautious approach in these situations is preferred. "Even though petitioner's condition, when controlled with medication, might never interfere with piloting an aircraft, we have on numerous occasions announced our unwillingness to take chances with air safety by treating an individual's 'control' of a disease as equal to its prevention or cure." Walker at 8.

¹³When Mr. Bullwinkel's petition for reconsideration was denied, the Administrator was under the impression that he was taking both lithium and Ritalin. Petitioner testified at the hearing that he had discontinued the Ritalin therapy and was taking lithium only. We express no view here regarding whether,

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's order denying a third-class airman medical certificate to petitioner is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)

based on Dr. Pakull's testimony, petitioner could obtain a restricted medical certificate while he is only taking lithium because this is not within the Board's purview. See Petition of Rose, NTSB Order No. EA-3260 at 3, n. 5 (1991), where we stated: "[T]he Board cannot order the placement of conditions or limitations upon any medical certificate, nor does the Board have jurisdiction to review the issuance or denial of special issuance medical certificates under FAR §67.19."

Appendix

"§ 67.17 Third-class medical certificate.

* * * *

(d) Mental and neurologic--
 (1) Mental.

* * * *

 (ii) No ... personality disorder, neurosis, or mental condition that the Federal Air Surgeon finds--
 (a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or
 (b) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges; and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

 (2) Neurologic.

* * * *

 (ii) No other convulsive disorder, disturbance of consciousness, or neurologic condition that the Federal Air Surgeon finds--
 (a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or
 (b) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges; and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

* * * *

(f) General medical condition:

* * * *

 (2) No other organic, functional or structural disease, defect, or limitation that the Federal Air Surgeon finds--

 (i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or
 (ii) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges; and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved."